

**Introduced by Senator Dunn**

February 20, 2004

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An act to add Chapter 7 (commencing with Section 945.26) to Title 7 of Part 2 of Division 2 of the Civil Code, relating to construction defects.

**LEGISLATIVE COUNSEL'S DIGEST**

SB 1833, as introduced, Dunn. Construction defects: joint cost sharing agreements.

Existing law sets forth the defects in residential construction that are actionable and the procedures necessary to bringing an action against a builder or other persons for a defect in residential construction.

This bill would require a builder against whom a construction defect claim has been received to offer all other potentially responsible persons a joint cost sharing agreement. The bill would specify the required contents and effect of that agreement, including the duty to indemnify other potentially responsible persons, and relief from specified legal responsibilities. The bill would require the builder to select the defense counsel to represent all parties to the agreement, as specified, and would prohibit claimants from bringing an action directly against a party to the agreement other than the builder. The bill would apply to all contracts between potentially responsible persons entered into after January 1, 2005.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.



*The people of the State of California do enact as follows:*

SECTION 1. Chapter 7 (commencing with Section 945.26) is added to Title 7 of Part 2 of Division 2 of the Civil Code, to read:

CHAPTER 7. JOINT COST SHARING AGREEMENTS

945.26. For purposes of this chapter:

(a) “JCSA” means a joint cost sharing agreement:

(b) “PRP” means a potentially responsible person. For purposes of this chapter, a potentially responsible person includes the builder, general contractor, subcontractor, and design professional.

(c) “Type 1 indemnity provisions” mean \_\_\_\_.

(d) “Wrap-up insurance policy” means \_\_\_\_.

945.27. It is the intent of the Legislature to promote the use of joint cost sharing agreements in order to lower the total costs to defendants, cross-defendants, and their insurers resulting from a construction defect claim. A joint cost sharing agreement is an agreement entered into by a builder and various potentially responsible persons to cooperate in jointly funding the defense and indemnity of a construction defect claim.

945.28. A JCSA may remain confidential and is not discoverable by the claimant upon agreement of the parties to the JCSA.

945.29. The primary objectives of a JCSA may be any or all of the following:

(a) Establishment of a mechanism of joint funding of a defense to respond to claims.

(b) Cooperation among PRPs to identify whether deficiencies exist and formulate a reasonable scope and method of repair to facilitate a prompt and equitable resolution of the claim.

(c) Avoiding litigation or reducing litigation costs by eliminating duplication of counsel, experts, and investigation costs attendant with protracted construction litigation.

(d) Improving the likelihood of successful resolution by establishing procedures for resolving issues and minimizing unnecessary controversy among the parties concerning allocation of defense and indemnity payments.

1 945.30. This chapter does not apply to the extent that PRPs are  
2 covered by a viable wrap-up insurance policy. A wrap-up  
3 insurance policy is viable if both the primary and excess policy  
4 limits have not been exhausted.

5 945.31. The builder shall promptly notify all PRPs upon  
6 receipt of a claim by a homeowner. The builder shall notify the  
7 PRPs by sending a copy of the claim to the PRPs. Within 30 days  
8 of notifying each PRP of a claim, the builder shall offer a JCSA to  
9 the nonbuilder PRPs. At a minimum, a JCSA shall include  
10 provisions for all of the following:

11 (a) Initial defense costs shall be allocated between all PRPs  
12 with each PRP responsible for an equal share of the defense costs.  
13 The initial allocation is an interim allocation that shall be subject  
14 to an ultimate reallocation pursuant to subdivision (j).

15 (b) If a PRP and its insurer or insurers timely enter into and  
16 perform all of their responsibilities pursuant to the JCSA, the PRP  
17 and the PRP's carrier shall ultimately be relieved of any Type 1  
18 indemnity provisions and the application of *Presley Homes, Inc.*  
19 *v. American States Ins. Co.* (2001) 90 Cal.App.4th 571.  
20 Accordingly, the liability of the participating PRPs and their  
21 carriers shall ultimately be limited, as follows:

22 (1) Notwithstanding whether a PRP's liability is based upon  
23 strict liability, negligence, breach of express or implied contract,  
24 statute, or otherwise by a claim brought by a claimant or another  
25 PRP, the obligation of a PRP to indemnify may not exceed an  
26 equitable apportionment to each PRP based upon that party's fault.  
27 If an allocation qualifies as an orphan share, as defined in  
28 subdivision (c), the orphan share shall be allocated pursuant to  
29 subdivision (d). This paragraph does not affect the validity of any  
30 insurance contract, workers' compensation policy, or agreement  
31 issued by an admitted insurer, as defined by the Insurance Code,  
32 other than an additional insured endorsement.

33 (2) With regard to any insurance contract that names a party as  
34 an additional insured, the duty to defend an additional insured is  
35 limited to only those claims that arise out of the named insured's  
36 work. However, this paragraph does not affect the validity of any  
37 insurance contract, workers' compensation policy, or agreement  
38 issued by an admitted insurer, as defined by the Insurance Code,  
39 other than an additional insured endorsement.



1 (3) A fully participating and performing nonbuilder PRP may  
2 not be subject to an action brought directly by a claimant.

3 (c) To the extent that both (1) a PRP has filed for bankruptcy  
4 protection and all debts have been discharged without fully  
5 satisfying the PRP's responsibility for the claim, and (2) all of its  
6 insurance coverage on the risk has been exhausted or the insurance  
7 policies are not otherwise legally available for payment, that  
8 portion of costs shall be considered an 'orphan share.'

9 (d) The orphan share shall be allocated as follows:

10 (1) If the orphan share arises out of a defect for which other  
11 PRPs are jointly and severally liable, the remaining jointly and  
12 severally liable PRPs and their carriers shall share the costs of the  
13 orphan share pursuant to existing principles of joint and several  
14 liability. Nothing in this subdivision prohibits, limits or affects a  
15 PRP's right to recover from any legally responsible party or entity.

16 (2) If the orphan share arises out of a defect for which the  
17 builder is legally liable, but a PRP is solely responsible and its  
18 insurance policies are exhausted or otherwise legally unavailable,  
19 the builder shall pay the costs of the orphan share. Nothing in this  
20 subdivision prohibits, limits or affects a PRP's right to recover  
21 from any other legally responsible party or entity.

22 (e) For PRPs and their insurers who opt-out of the JCSA or do  
23 not participate in the JCSA, but perform according to the JCSA,  
24 those nonparticipating PRPs and their insurers shall be subject to  
25 all otherwise applicable laws and contractual provisions without  
26 the benefit of subdivision (b). The construction contract between  
27 the builder and the nonparticipating PRPs and their respective  
28 insurance policies shall be enforceable, notwithstanding the status  
29 of the contractor's license of either party at any relevant time. If  
30 the entire indemnity provision of a residential construction  
31 contract is otherwise invalid or unenforceable, equitable  
32 indemnity shall apply. In addition, insurers that opt-out of the  
33 JCSA or do not participate in the JCSA, but perform according to  
34 the JCSA, may also, at the court's discretion based on applicable  
35 law, be subject to liability for all defense and indemnity costs of  
36 all of the PRPs to the fullest extent permitted by law. Any  
37 participating PRP has the right, at that participant's own expense,  
38 to retain separate counsel and experts to monitor the process and  
39 to request information from defense counsel and the experts of  
40 record.

(g) The builder shall select the defense counsel of record subject to all of the following requirements:

(1) The builder shall provide to the nonbuilder PRPs the name, address, telephone number, qualifications, and billing rates of the defense counsel.

(2) The defense counsel of record shall have at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation.

(3) Defense counsel of record shall have errors and omissions insurance coverage.

(4) The itemized bills of the defense counsel of record shall be submitted to each PRP with a breakdown of the amount owed by each party. The PRPs shall have the right to review and audit the underlying litigation file and legal billings of the defense counsel of record. The nonbuilder PRPs and insurers' obligation to pay fees to the defense counsel of record is limited to the rates which are actually paid by the applicable nonbuilder PRP or insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended.

(5) Defense counsel of record may not participate as counsel in any separate action to reallocate costs.

(h) Any PRP may have the option to opt out of the JCSA. However, in doing so, the PRP shall lose the benefits of subdivision (b).

(i) PRPs and their insurers shall have 30 days from the date that the builder offers the JCSA to nonbuilder PRPs to enter into the JCSA pursuant to this section.

(j) The initial allocation shall be subject to reallocation to determine the ultimate obligation of each PRP and their insurer. The reallocation shall be conducted through a mediation and shall be subject to the limitations provided in subdivision (b). The reallocation of defense costs may be resolved in the same mediation as the mediation of indemnity costs. If mediation does not result in an agreement on the ultimate obligation of each PRP, the matter shall be resolved by binding arbitration. Nonparticipating or nonperforming PRPs may not participate in the reallocation unless all parties agree in writing.

(k) The JCSA may include any provision not inconsistent with this section.

- 1     *(l)* This chapter shall apply to contracts between PRPs entered
- 2     into after January 1, 2005.

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